87-2081

No.

Supreme Court, U.S.
FILED
JUN 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES V. SPERRAZZA, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS

LEO L. SERGI
Colonel, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC
20332-6128
(202) 767-1562
Counsel of Record

WILLIAM J. RIECHART
Major, Office of The Judge Advocate General
United States Air Force

QUESTION PRESENTED

Whether petitioner was denied his right to a speedy trial as guaranteed by Military Rule for Court-Martial 707, and the Sixth Amendment to the Constitution of the United States.[1]

•

[1] These questions and this petition are presented to this Honorable Court pursuant to counsel's obligation to petitioner as mandated by Article 70(c)(1) of the Uniform Code of Military Justice, 10 U.S.C. §870(c)(1)(Supp. III 1985), and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); *cf., Jones v. Barnes*, 463 U.S. 745 (1983).

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	ii
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Court of Military Appeals

United States v. Colon-Angueira, 16 M.J. 20 (C.M.A. 1983) 6
United States v. Leonard, 3 M.J. 214 (C.M.A. 1977) 6
United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985) 6
United States v. Sperrazza, U.S.C.M.A. Dkt. No. 59, 501/AF ..... APP. A.

Courts of Military Review

United States v. Mobley, 12 M.J. 1029 (A.C.M.R. 1982) . 6
United States v. Gray, 21 M.J. 1020 (N.M.C.M.R. 1986) . 5
United States v. Hulsey, 21 M.J. 717 (A.F.C.M.R. 1985) . 5
United States v. Sperrazza, A.C.M. 26217 ..... APP. B.

Constitutional and Statutory Authorities

United States Constitition

Sixth Amendment 2, 4, 7

Statutory Authority

10 U.S.C. § 831 ..... 2, 5

Other Authorities

Manual for Courts-Martial, 1984

Rule for Court-Martial 707 ..... 4, 5, 6, 7
Rule for Court-Martial 304(a) 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

CHARLES V. SPERRAZZA, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Charles V. Sperrazza, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on April 22, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals was issued on April 22, 1988 (Appendix A). The original decision of the United States Air Force Court of Military Review was issued on December 9, 1987 (Appendix B).

JURISDICTION

The jursidiction of this Court is invoked under 10 U.S.C. §867(h)(Supp III 1985) and 28 U.S.C. §1259(3) (Supp III 1985). The judgement of the United States Court of Military Appeals was entered on April 22, 1988.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

STATEMENT OF THE CASE

Petitioner was tried by general court-martial before the military judge sitting alone at Wright-Patterson Air Force Base, Ohio. In accordance with his pleas, he was found guilty of use of a controlled Schedule II substance, fentanyl, on April 1, 1986.

Petitioner was sentenced to dismissal from the service and total forfeitures of pay and allowances. The convening authority approved the sentence as adjudged on August 18, 1987. On December 9, 1987, the United States Air Force Court of Military Appeals affirmed the findings of guilty and the sentence as approved. (App B). The United States Court of Military Appeals granted review of the case, affirmed the findings, and approved only so much of the sentence as provided for a dismissal from the service and forfeiture of two thirds of petitioner's pay per month on April 22, 1988.

Petitioner, an anesthesiologist and medical doctor, is alleged to have used fentanyl at the Wilford-Hall Medical Center, Lackland Air Force Base, San Antonio, Texas on April 1, 1986. (Pros. Exh. 1, R. 146, 147). Petitioner was escorted to the psychiatric ward at Wilford-Hall because of suspected drug abuse on April 1, 1986 by Major Miller who was a police officer within the State of Texas. (App. Exh. XI). That ward is a secured location which does not permit unescorted egress. (R. 12, 72-73). Petitioner was read his rights against self-incrimination under Article 31,

U.C.M.J., was placed under suicide prevention measures, and was kept under continuous eye contact by the staff. (R. 74-79). Petitioner never exhibited symptoms of drug withdrawal or suicidal tendencies during his entire stay on the ward. (R. 25). Petitioner complained of the confinement and restrictions on several occasions throughout his 15 days on the ward. (R. 79). Petitioner was removed from suicide prevention controls on April 7, 1986. (R. 80). Petitioner was reinstated on suicide controls and continuous eye contact on April 8, 1986 when he was informed his blood and urine specimens analyzed positive for the presence of fentanyl. (R. 104-105). Suicide and eye contact restrictions were rescinded for petitioner on April 9, 1986. (R. 81). No medical reasons remained for incarceration of petitioner on the locked, limited access ward after April 9, 1986. (R. 76, 77, 78, 88). Petitioner filed a Complaint of Wrong against his Commander under Article 138, U.C.M.J. on April 15, 1986, requesting release from the psychiatric ward. (10 U.S.C. §938, R. 108-110). Two hours after the Complaint of Wrong was filed with Major General Miller, Commander, Wilford-Hall Medical Center, petitioner was released from the psychiatric ward. (R. 110-111). Major General Miller states in a letter that the reasons for admission to the ward were detoxification and to observe petitioner's adjustment to the situation. A previous incident with unpleasant results was mentioned as partial justification. (Pros. Exh. V). That prior incident was a suicide by an officer under similar drug abuse allegations. (R. 29). Petitioner was informed that part of the delay in his release was caused by lack of a decision on what installation would control disposition of his case and appropriate disciplinary action. (R. 113). Petitioner was sent to Wright-Patterson Air Force Base, Ohio, where he was notified his medical privileges to practice as an

anesthesiologist had been withdrawn on April 16, 1986. (App. Exh. III, R. 114). Petitioner made repeated attempts to have his medical privileges restored including May 12, 1986 and June 11, 1986. (App. Exh. III, R. 114-116). Petitioner was formally charged on July 24, 1986. (App. Exh. III). Petitioner was arraigned on June 2, 1987. (R. 7). Petitioner was responsible for delays from August 11, 1986 to September 4, 1986, and from November 5, 1986 until date of trial, June 2, 1987. (App. Exh III). Petitioner moved to have all charges dismissed at trial for denial of a speedy trial, but that motion was denied. (App. Exh. III, R. 137). April 10 to November 4 is 207 days. Defense delays therein equal 25 days. Thus, the government took 182 days to bring petitioner to trial.

REASONS FOR GRANTING THE WRIT

Rule for Court-Martial (R.C.M.) 707, Manual for Courts-Martial, 1984, Change 2, specifies:

"(a) *In General.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Notice of preferral of charges under Rule for Court-Martial 308;

(2) The imposition of restraint under Rule for Court-Martial 304(a)(2)-(4); or:

(3) Entry on active duty under R.C.M. 204."

Thus, the President and Congress have quantified the right to a speedy trial under the Sixth Amendment to the Constitution of the United States for persons in the military by imposing a requirement that the accused be tried within 120 days of imposition of restraint or preferral of charges, whichever is earlier. Petitioner was brought to trial within 120 days of preferral of charges, deducting defense requested delays, but was not brought to trial until 182 days after the last medical reason for confinement of

the petitioner in the psychiatric ward at Wilford-Hall had expired. The petitioner was unjustifiably confined from April 10, 1986 until April 15, 1986 and thereafter was prevented from practicing his avowed profession until preferral of charges on July 24, 1986. Continuing conditions existed which preclude this mere physical release from amounting to that release from pretrial restraint which would serve to toll the accumulation of accountable time under R.C.M. 707(b)(2). *But see, United States v. Hulsey,* 21 M.J. 717 (A.F.C.M.R. 1985) and *United States v. Gray,* 21 M.J. 1020 (N.M.C.M.R. 1986). Petitioner was told that he would be court-martialed either at Lackland or at Wright-Patterson. He had repeatedly been read his rights against self-incrimination under Article 31, U.C.M.J. His medical privileges were suspended and not reinstated based upon the incident and he was not allowed to work at his profession. The continuous mental restrictions on petitioner between date of physical release and preferral of formal charges negate any contention that those days should not be counted toward denial of a speedy trial and violation of R.C.M. 707's 120-day limit. The Court in *Gray, supra,* noted that R.C.M. 707 is predicated upon ABA standards. ABA Standard 12-2.2 provides that the time for trial should commence running from the date the charge is filed, except that if the defendant had been continuously held in custody or on bail or under recognizance until that date to answer for the crime . . . then the time for trial should commence running from the date the defendant was held to answer.

The military has no status comparable to bail in the civilian community but "under recognizance" certainly must equate with the conditions under which petitioner labored from April 15, 1986 until July 24, 1986. Thus, the speedy trial clock would not have been stopped in the

civilian community on these facts. The military standard should be no different, absent military exigencies which are not present herein. Additionally, petitioner was prevented from practicing his profession, a condition without parallel under civilian practice. That is an additional vestige that petitioner was actually in a quasi-recognizance status pending the date for answering for the alleged crime.

Petitioner's incarceration in the locked psychiatric ward at Wilford-Hall when all medical reasons for that incarceration had ceased to exist constitutes the pretrial restraint contemplated by R.C.M. 304(a)(4) which triggers the speedy trial clock of R.C.M. 707. Pretrial restraint is physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of restriction in lieu of arrest, arrest, or confinement. R.C.M. 304(a).

Petitioner suffered pretrial physical confinement from April 10, 1986 until April 15, 1986. Petitioner was confined on a mental/psychiatric ward for five days after any legitimate medical reason for this confinement had ceased to exist. No psychiatric request from the defense exists to make this period accountable to the defense. *United States v. Leonard,* 3 M.J. 214 (C.M.A. 1977) and *United States v. Colon-Angueira,* 16 M.J. 20 (C.M.A. 1983). The ward was secured. He could not leave without staff or escort. Access to the accused by friends and counselors was restricted. Lack of a decision on how or where to proceed with disciplinary matters was an identifiable rationale for retaining the petitioner in the confined status. Confinement lasts until a person is set at liberty by appropriate authority. *United States v. Mobley,* 12 M.J. 1029 (A.C.M.R. 1982). Denial of outside contact can amout to improper pretrial punishment. *United States v. Palmiter,*

20 M.J. 90 (C.M.A. 1985). Denial of outside contact should, therefore, be indicia of confinement in this case.

CONCLUSION

The petitioner was denied his right to a speedy trial as guaranteed by R.C.M. 707 and the Sixth Amendment to the Constitution of the United States in that he was placed in a confinement status and thereafter prevented from practicing his profession for a period of 182 days accountable to the government prior to his trial.

WHEREFORE, appellant prays for a grant of certiorari to review the decision of the United States Court of Military Appeals in this case.

LEO L. SERGI
Colonel,
Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

WILLIAM J. RIECHART
Major, Office of The Judge Advocate General
United States Air Force

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 59501/AF
CMR Dkt. No. 26217

UNITED STATES, APPELLEE

v.

CHARLES V. SPERRAZZA (068-50-4502), APPELLANT

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review in light of *United States v. Warner,* 25 M.J. 64 (C.M.A. 1987), it is by the Court this 22nd day of April, 1988

ORDERED:

That said petition is hereby granted on Issue I raised by appellate defense counsel; and

That the decision of the United States Air Force Court of Military Review is reversed as to that portion of the sentence which provides for forfeitures in excess of two-thirds pay per month until the dismissal is ordered executed; the excess forfeiture is set aside, and the amount of that excess which has been collected will be restored to appellant. In all other respcts the decision below is affirmed.

For the Court,
/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (REICHART)
Appellate Government Counsel (GIOVAGNONI)

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 26217

UNITED STATES

v.

CAPTAIN CHARLES V. SPERRAZZA FR 068-50-4502,
UNITED STATES AIR FORCE

Dec. 9, 1987

Sentence adjudged 4 June 1987 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Andrew J. Adams, Jr.

Approved sentence: Dismissal and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major William J. Reichart. Appellate Counsel for the United States: Colonel Joe R. Lamport and Lieutenant Colonel Robert E. Giovagnoni.

Before
FORAY, MICHALSKI and MURDOCK
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial

rights of the accused was committed. Accordingly, the findings of guilty and sentence are AFFIRMED.

OFFICIAL:
/s/ LAURA L. GREEN
LAURA L. GREEN
Documents Examiner
Court of Military Review